**From:** Clewley,Daniel T
**To:** 'microsoft.atr(a)usdoj.gov'
**Date:** 12/14/01 5:24pm
**Subject:** Reject the DOJ Settlement

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**CC:** 'thurrott(a)win2000mag.com'

I urge the Honorable Judge Colleen Kollar-Kotelly to reject the proposed settlement between Microsoft and the US Department of Justice (DOJ). I strongly support that the proposed remedy from the remaining states and ask that it be accepted. Adopting the DOJ settlement will reward Microsoft for its past criminal actions, encourage future misconduct, damage the few remaining viable competitors, and force consumers to continue to pay inflated prices for inferior software. The attached analysis and opinion from the Editor of Win 2000 Magazine accurately conveys my beliefs regarding how and why the convicted monopolistic Microsoft corporation should be punished. "Unlike the previously announced settlement between the DOJ and Microsoft, these remedies create a real prospect of achieving what the DOJ said it intended to accomplish: 'Stop Microsoft from engaging in unlawful conduct, prevent any recurrence of that conduct in the future, and restore competition in the software market.'"

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-----Original Message-----
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1. ==== NEWS AND VIEWS ====
(contributed by Paul Thurrott, News Editor, thurrott@win2000mag.com)

* AN ANALYSIS AND OPINION OF THE STATES' PROPOSED MICROSOFT REMEDY

As expected, on Friday the District of Columbia and the nine remaining US states allied against Microsoft presented their proposed remedy for Microsoft's antitrust case. After the watered-down and ineffectual proposed settlement between Microsoft and the US Department of Justice (DOJ) and nine other US states last month, I didn't expect much from this proposed remedy. But this proposal is far more realistic and pragmatic than the earlier proposed settlement, and I strongly urge Judge Colleen Kollar-Kotelly to wholeheartedly reject the DOJ agreement and adopt this proposed remedy instead. In this analysis and opinion, I'll examine the remedial proposals the states have presented and explain why they represent a more suitable punishment for Microsoft's repeated violations of US antitrust law.

But first, a quick review. The US Court of Appeals for the District of Columbia unanimously agreed with the earlier ruling that Microsoft had illegally maintained its desktop OS monopoly by "suppressing emerging technologies that threatened to undermine its monopoly control." Microsoft prevented these technologies, which included Sun's Java and Netscape's Web browser, among others, from succeeding by maintaining what the Court of Appeals called the "applications barrier to entry," in which a dominant platform such as Windows stays in power by keeping consumers locked in. As noted in the proposed remedy, "the applications barrier to entry, coupled with Microsoft's 90 percent plus market share, gave Microsoft the power to protect its 'dominant operating system irrespective of quality' and to 'stave off even superior new rivals.'"

To specifically combat Java and Netscape, Microsoft "aggressively and unlawfully prevented these rivals from achieving the widespread distribution they needed to attract software development and ultimately make other platforms meaningful competitors with Microsoft's Windows operating system." The proposed remedy also notes that the US Court of Appeals "cataloged an extensive list of anticompetitive [and] exclusionary acts by which Microsoft artificially bolstered the applications barrier to entry, including commingling the software code for its own middleware with that of its monopoly operating system,

thereby eliminating distribution opportunities for competing middleware; threatening to withhold and withholding critical technical information from competing middleware providers, thereby allowing Microsoft middleware to obtain significant advantages over its rivals; threatening to withhold porting of critical Microsoft software applications and financial benefits from those who even considered aiding its rivals; contractually precluding [PC makers] and ultimately end users from the opportunity to choose competitive software; and even deceiving software developers to conceal the fact that the software they were writing would be compatible only with Microsoft's platform." The list is long and, sadly, only a subset of the strategies that Microsoft has employed over the years to stifle competition and innovation.

After losing its appeal, Microsoft entered a new phase of its antitrust trial. Kollar-Kotelly recommended that the company attempt to settle the case, and the court eventually provided a mediator. Then on October 31, the last day of mediation, Microsoft and the DOJ shocked the world by announcing a settlement. However, Microsoft critics immediately denounced the settlement as being too lenient on the company. Even I referred to the settlement as "a travesty of justice that leaves an illegal monopoly in a position of power, enabling Microsoft to continue harming competitors, partners, and even customers" (see the URL at the end of this article for my take on the DOJ and Microsoft settlement).

As a result, the District of Columbia and nine of the 18 states allied against Microsoft refused to sign the agreement, calling on antitrust precedent and noting that "the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it," and "a remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct' to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.'" So the states' proposed remedy, delivered Friday as required, addresses these issues and punishes Microsoft for its illegal behavior. And the proposal elegantly explains why Microsoft should be punished in a manner more appropriate than that in the DOJ settlement.

"A meaningful remedy must do more, however, than merely prohibit a recurrence of Microsoft's past misdeeds," the proposed remedy reads. "[First,] it must also seek to restore the competitive balance so that competing middleware developers and those who write applications based on that middleware are not unfairly handicapped in that competition by Microsoft's past exclusionary acts, and [secondly,] it must be forward-looking with respect to technological and marketplace developments, so that today's emerging competitive threats are protected from the very anticompetitive conduct that Microsoft has so consistently and effectively employed in the past. Only then can the applications barrier to entry be reduced and much-needed competition be given a fair chance to emerge."

The states even specifically take a jab at the proposed DOJ and Microsoft settlement. "Unlike the previously announced settlement between the DOJ and Microsoft, these remedies create a real prospect of achieving what the DOJ said it intended to accomplish: 'Stop Microsoft from engaging in unlawful conduct, prevent any recurrence of that conduct in the future, and restore competition in the software market.'"

Here are the states' proposed remedies. I've ordered them by magnitude, with the proposed remedies I consider the most important listed first.

1. Microsoft should be required to license its Office source code so that competitors can sell Office on rival platforms. "To begin to erode the applications barrier to entry that was enhanced by Microsoft's unlawful behavior, and thereby begin to 'pry open to competition a

market that has been closed by defendants' illegal restraints,' Microsoft should be required to auction to a third party the right to port Microsoft Office to competing operating systems," the proposal reads. Also, Microsoft should be forced to continue offering its Macintosh Office product, with the stipulation that each revision of that product ship within 60 days of each Windows version of the suite and include similar functionality. And Microsoft should be forced to auction off Office licenses so that at least three companies can port the suite to the platforms of their choice; Microsoft will receive a royalty for each auction but no further payments. And Microsoft will be required to give the third parties all the technical information needed to make the ports successful.

This controversial remedy hits Microsoft right in the gut because it hands over some of the company's crown jewels--the source code to its dominant Office products--to competitors and opens up the Office productivity market once again. Critics have long maintained that Microsoft's OS monopoly is unfairly bolstered by users' reliance on Office, and this proposal seeks to answer that complaint. Indeed, given that many of Office's features have found their way into Windows over time and that the Office team has had unfair and early access to internal Windows technologies for years, it's only fair that competitors get the same benefits.

2. Microsoft should be forced to open-source Internet Explorer (IE). Much of the original trial focused on Microsoft's illegal bundling of IE in Windows solely to harm its competitor Netscape; the Appellate Court finally ruled that Microsoft designed IE not to make browsing more attractive to users, but to discourage PC makers from distributing rival products. In other words, the company "integrated" IE into Windows solely to harm Netscape, not to help its customers. "Eliminating Netscape and establishing [IE] as the dominant browser was a critical component of Microsoft's monopoly maintenance strategy," the proposed remedy notes. "Given that Microsoft's browser dominance was achieved to bolster the operating system monopoly, the remedial prescription must involve undoing that dominance to the extent it is still possible to do so. Accordingly, the appropriate solution is to mandate open-source licensing for [IE], thereby ensuring at a minimum that others have full access to this critical platform and that Microsoft cannot benefit unduly from the browser dominance that it gained as part of its unlawful monopolization of the operating system market."

If the court enacts this proposal, Microsoft will have to disclose and license the source code for all current and future versions of IE and any related Web-browsing functionality found in various versions of Windows. This action will give competitors and other developers a perpetual, royalty-free license to create any derived products they want, without fear of retaliation from Microsoft. As with the Office porting proposal, this proposal hits right at the heart of the matter and is an appropriate remedy for a company that abused competitors, partners, and users through its anticompetitive bundling of IE and Windows.

3. Microsoft's bundled software should be unbundled from Windows. As with the previous proposal, this requirement relates to Microsoft's illegal commingling of IE and other middleware with Windows, which deterred PC makers and users from installing competing products. The states give Microsoft two options: Either cease bundling middleware such as IE, Windows Media Player (WMP), and Windows Messenger in all current and future versions of Windows, or start selling Windows versions that don't include those bundled applications. If the court chooses the latter option, those unbundled Windows versions should cost significantly less than the versions that include bundled software and should function properly. This requirement applies to Windows XP, Windows 2000, Windows Me, and Windows NT 4.0, but not to Windows 98 or Win98 SE, for some reason.

Again, I endorse any remedy that addresses a specific area in which the court found Microsoft guilty of breaking the law. Indeed, the US Court of Appeals for the District of Columbia unanimously upheld the earlier District Court ruling that Microsoft bundled middleware such as IE solely to "deter computer manufacturers from installing a rival browser such as Netscape Navigator. Microsoft offered no specific or substantiated evidence to justify such commingling, and such commingling had an anticompetitive effect." Users and PC makers should be able to choose whether to install Microsoft or third-party middleware, and this proposal makes the choice possible. Contrast this solution to Windows XP, where users can't uninstall components such as WMP, Windows Movie Maker (WMM), and Windows Messenger, let alone replace them with other software.

4. If Microsoft knowingly violates the terms of this remedy, the company should be forced to license the source code of the product in question. Given Microsoft's repeated violation of previous agreements, this proposed remedy is key. If the court finds in the future that Microsoft illegally commingled software code into Windows, for example, the company will have to freely license the Windows source code to the appropriate parties. "If the Court determines that Microsoft has knowingly committed an act of Material Non-Compliance, the Court may, in addition to any other action, convene a hearing to consider an order requiring Microsoft to license its source code for the Microsoft software that is implicated by the act of Material Non-Compliance to anyone requesting such a license for the purpose of facilitating interoperability between the relevant Microsoft product and any non-Microsoft product," the ruling reads. If the court finds that Microsoft knowingly engaged in a pattern of noncompliance, the company will have to pay fines and suffer further appropriate remedies.

This remedy is crucial because it openly warns Microsoft about the consequences of its future behavior, giving the company no wiggle room to "reinterpret" its legally binding conduct remedies as it has so often in the past.

5. Microsoft should be forced to adhere to industry standards. Microsoft frequently "embraces" open standards only to "extend" them with proprietary additions that make interoperability with non-Windows platforms difficult or impossible. The states refer to this practice as the "co-opting and/or undermining of industry standards," and they point to Microsoft's specific behavior regarding Java: The company "purposely deceived software developers into believing that the Microsoft Java programming tools had cross-platform capability with Sun-based Java" when they didn't. Under terms of this proposal, Microsoft would again have two options: The company could adopt and implement industry standards into its products and not modify them at all. Or it could modify these technologies and supply the changes to any party that requests them. Furthermore, Microsoft couldn't require third parties to use standards-based technologies it had modified.

This is another compelling request, because it addresses a specific behavior Microsoft has long been guilty of. If enacted, Microsoft's embrace-and-extend strategy will be open to competitors and thus rendered moot.

6. Microsoft should be forced to distribute Java with Windows and IE. According to the states, "Microsoft's destruction of the cross-platform threat posed by Sun's Java technology was a critical element of the unlawful monopoly maintenance violation affirmed by the Court of Appeals. Microsoft continues to enjoy the benefits of its unlawful conduct, as Sun's Java technology does not provide the competitive threat today that it posed prior to Microsoft's campaign of anticompetitive conduct. Because an appropriate antitrust remedy decree should, among other things, attempt 'to deny to the defendant the fruits of its statutory violation,' Microsoft must be required to

distribute Java with its platform software (i.e., its operating systems and [IE] browser), thereby ensuring that Java receives the widespread distribution that it could have had absent Microsoft's unlawful behavior, and increasing the likelihood that Java can serve as a platform to reduce the applications barrier to entry." Under the proposal's terms, this bundling would continue for 10 years and would require Microsoft to continue developing modern versions of Java that conform to Sun's latest Java specifications.

This is the only part of the proposal I disagree with, largely because Sun has never opened up Java to an internationally recognized standards body (I likewise reject any argument that Java is a de facto standard). During the company's original trial, the court asked Bill Gates about Microsoft bundling Netscape Navigator in Windows. Gates replied that that would be like requiring Coca-Cola to include one Pepsi in each of its six-packs of Coke. I agree that such a requirement is ludicrous, as is requiring Microsoft to bundle Java with Windows.

The remaining proposed remedies are less exciting and more closely mimic the remedies in the DOJ's proposed settlement. Thus, I'll cover them more succinctly.

7. Microsoft should be required to reveal all interoperability technologies so that "Microsoft middleware developers [don't] receive preferential disclosure of technical information over rival middleware developers."

8. Microsoft should have to license its intellectual rights when necessary to meet the requirements of this remedy. Some of the aforementioned proposals will require Microsoft to license its intellectual property to third parties. The company will have to do so when appropriate.

9. Microsoft should have to provide uniform and nondiscriminatory licensing to PC makers, regardless of their relationships with Microsoft and Microsoft competitors.

10. Microsoft should be prohibited from entering into agreements that would harm competition. Furthermore, "Microsoft must also be prohibited from taking certain actions that could unfairly disadvantage its would-be competitors, whether by knowingly interfering with the performance of their software with no advance warning or entering into certain types of contracts that could unreasonably foreclose competing middleware providers."

11. Microsoft should be banned from retaliating against companies or users that choose non-Microsoft technologies.

12. Microsoft should be prevented from forcing PC makers and users to choose Microsoft-only solutions. No Microsoft middleware can be included in Windows unless it can also be removed and replaced by PC makers and end users.

13. Microsoft should be prohibited from requiring partners to sign noncompete agreements, such as the agreement it allegedly tried to enter into with Netscape.

14. Microsoft should be required to undergo regular compliance certification to ensure that it meets the requirements of the ruling against it. This certification will include an internal compliance officer, annual compliance certifications, a compliance committee consisting of at least three members of Microsoft's Board of Directors, and extensive internal-document retention.

15. A Special Master should be empowered to promptly investigate any future complaints against Microsoft.

16. Microsoft should be required to report any potential technology or corporate acquisitions to the plaintiffs for review because the company has used such acquisitions in the past to extend its monopoly power.

Folks, this proposal represents your tax dollars at work. I salute the states of California, Connecticut, Florida, Iowa, Kansas, Massachusetts, Minnesota, Utah, West Virginia, and the District of Columbia for erecting a logical and workable remedy that addresses, rather than rewards, Microsoft's illegal, anticompetitive behavior. Just weeks ago, it seemed that Microsoft would escape punishment, but these proposed remedies give new hope that justice will be served. If Judge Kollar-Kotelly can at least find a happy middle ground between the DOJ's proposed settlement and this more reasonable set of remedies, we might see competition and innovation return to the computer industry. If I'm not mistaken, that was the original point of this legal nightmare.

Further reading: An Analysis and Opinion of the Microsoft Antitrust Settlement
http://www.wininformant.com/articles/index.cfm?articleid=23112